

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JERALD THOMAS,

Plaintiff,

v.

Case No. 2:07-cv-13
HON. ROBERT HOLMES BELL

FERNANDO FRONTERA,

Defendant.

OPINION AND ORDER APPROVING MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION

The Court has reviewed the Report and Recommendation that Defendant's motion to dismiss be denied, which was filed by the United States Magistrate Judge on April 2, 2007. The Report and Recommendation was duly served on the parties. The Court received objections from the Defendant. In accordance with 28 U.S.C. § 636(b)(1), the Court has performed *de novo* consideration of those portions of the Report and Recommendation to which objection has been made. The Court now finds the objections to be without merit.

Defendant claims that because Plaintiff has attached copies of grievances to his complaint which show that the grievance was rejected as duplicative at each stage, he is entitled to rely on this to show that Plaintiff failed to comply with the exhaustion requirement. Because Defendant filed a motion to dismiss, the court must rely on Plaintiff's complaint to determine whether Plaintiff complied with the exhaustion requirement. Fed. R. Civ. P. 12 (b)(6). However, nowhere in the complaint does Plaintiff allege that he failed to exhaust his grievance remedies. The

fact that Plaintiff attached some grievances to his complaint is of no consequence. It is not Plaintiff's burden to prove exhaustion in his complaint by providing the court with every grievance filed at issue in this case. Moreover, the fact that the grievance was rejected as duplicative implies that Plaintiff did file other grievances on this issue.

THEREFORE, IT IS ORDERED that the Report and Recommendation of the Magistrate Judge is approved and adopted as the opinion of the court.

IT IS FURTHER ORDERED that Defendant's motion to dismiss (docket #4) is DENIED.

Dated: May 31, 2007

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
CHIEF UNITED STATES DISTRICT JUDGE